

2. rejects claims 1 under 35 U.S.C. § 102(b) as being anticipated by United States Patent no. 4,922,645 entitled "Magnetic Fishing Hook Guard and Method" which issued May 8, 1990, on an application filed by Douglas Hannon and Bingham A. McClellan ("the Hannon, et al. patent");
3. rejects claims 1-3, 12-15, 24, 26 and 40-41 under 35 U.S.C. § 103(a) as being unpatentably obvious over United States Patent no. 4,715,142 entitled "Self-Destruct Fish Hook" which issued December 29, 1987, on an application filed by Joseph D. Richard ("the Richard patent") in view of Hannon, et al. patent;
4. rejects claims 4-11, 16, 25 and 42-47 under 35 U.S.C. § 103(a) as being unpatentably obvious over the Richard patent in view of the Hannon, et al. patent, and further in view of United States Patent no. 4,893,430 entitled "Multi-Jointed Beaded Fishing Worm Lure" which issued January 16, 1990, on an application filed by Timmy R. Barfield ("the Barfield patent");
5. rejects claims 22-23 and 37-39 under 35 U.S.C. § 103(a) as being unpatentably obvious over United States Patent no. 4,970,808 entitled "Electro-Acoustical Fishing Lure" which issued November 20, 1990, on an application filed by Lewis E. Massie ("the Massie patent") in view of the Hannon, et al. patent; and

6. rejects claims 17-21 and 27-36 under 35 U.S.C. § 103(a) as being unpatentably obvious over United States Patent no. 5,697,182 entitled "Fishing Lure" which issued December 16, 1997, on an application filed by Nicholas A. Rodgers ("the Rodgers patent") in view of the Hannon, et al. patent.

Description of the Amendments

Independent claim 1 has been amended to correct a typographical error.

The Claimed Invention

The invention, as presently expressed in the independent claims, is fishing gear which includes an electret for inducing a strike response in fish.

The Cited References

The abstract of the Hannon, et al. patent describes a fish hook:

1. which has a guard that includes a magnet to attract a movable hook to a relatively shielded position in contact with the guard where the hook is less likely to snag on weeds than when it hangs loosely or is free swinging; or
2. magnetism may be used to hold a weed guard in a position where it shields a hook.

The strike of a fish can pull the hook free from the magnet or weed guard and enable its point to penetrate the mouth of the fish. (Abstract)

The Hannon, et al. patent also discloses magnetizing the fish hook so it will be attracted to materials included in a guard or lure.

Summarizing near the end of its text the Hannon, et al. patent declares:

[i]t has thus been shown that by the practice of our invention, magnetism can be used to move or hold a fish hook in a first position where it is at least partially shielded by a bait or another hook and thus is less likely to snag. This use of magnets does not interfere with the natural appearance or action of the baits, and magnetically holding a free swinging hook in contact with the underside of a plug improves its swimming action. Also, when the hook is magnetically held in contact with a fishing lure body, the lure is easier to cast. Imbedding a magnetic weed guard 10, 36, or 74 in the underside of a fishing lure 1, 30, or 65 lower its center of gravity and thus helps to prevent the lure from turning upside down as it is retrieved over obstructions. A single relatively large treble hook 19 can be used in place of a pair of smaller treble hooks by eliminating the tail hook and employing an S-hook 23 to locate the hook barbs adjacent tail end 27, when the hook is magnetically held in contact with the lure body 14. The hooks 40 and 41 act as weed guards for each other, and they are moved out of the way by a fish striking from any angle, and similarly magnetic weed guard 55 is tripped by a fish striking from any angle. Also, after magnetic guard 55 has been tripped, or hooks 40 and 41 have been separated, they move to a second portion out of the way and do not act as obstructions to the hooking of the fish, as do spring type and other common weed guards. The use of magnet 74 to hold hook 75 against lure body 66 also prevents body 66 from floating up line 72 away from the hook if the lure is retrieved with a jiggling or jerking type movement or if the lure is retrieved in a stop and go manner. (Col. 5, lines 35-66)

Clearly the Hannon, et al. patent does not disclose nor does it suggest that magnetism or a magnet in conjunction with a fish hook or lure induces a strike response in fish.

Legal Principles Applicable to Rejections Under 35 U.S.C. 102(b)

[F]or anticipation under 35 U.S.C. § 102, the reference must teach **every aspect** of the claimed invention either explicitly or impliedly. Any feature not directly taught must be inherently present. Manual of Patent Examining Procedure ("MPEP") July 1998 § 706.02, p. 700-10 (Emphasis supplied)

"Anticipation under 35 U.S.C. § 102 requires the disclosure in a single piece of prior art of each and every limitation of a claimed invention." Rockwell International Corporation v. The United States, 147 F.3d 1358, 1363, 47 USPQ2d 1027, 1031 (Fed. Cir. 1998) citing National Presto Indus. v. West Bend Co., 76 F.3d 1184, 1189, 37 USPQ2d 1685, 1687 (Fed. Cir. 1966). In determining anticipation under 35 U.S.C. § 102, functional language, preambles, and language in "whereby," "thereby," and "adapted to" clauses cannot be disregarded. Pac-Tec, Inc. v. Amerce Corp., 903 F.2d 796, ___, 14 USPQ2d 1871, 1876 (Fed. Cir. 1990).

Legal Principles Applicable to Rejections Under 35 U.S.C. 103(a)

Certain well established principles are to be applied in assessing whether or not an invention is patentable under 35 U.S.C. 103(a). First, the claims of a patent, which define the invention, are "to be construed in light of the specification and both are to be read with a view to ascertaining the invention." United States v. Adams, 383 U.S. 39, 49, 148 USPQ 479, 482 (1966). The "differences between the prior art and the claims at issue are to be

ascertained." Graham v. John Deere Co., 383 U.S. 1, 17, 148 USPQ 459, 467 (1966). Moreover, it is elementary that the claimed invention must be considered as a whole in deciding obviousness. Litton Industrial Products, Inc. v. Solid State Systems Corp., 755 F.2d 158, 164, 225 USPQ 34, 38 (Fed. Cir. 1985). The prior art as a whole must be considered, and those portions of the prior art arguing against or teaching away from the claimed invention must be considered. Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve, Inc., 796 F.2d 443, 448, 230 USPQ 416, 420 (Fed. Cir. 1986), In re Hedges, et al., 783 F.2d 1038, 1041, 228 USPQ 685, 687 (Fed. Cir. 1986).

An invention is obvious under 35 U.S.C. § 103(a), only if the prior art suggests a modification of the reference(s) and/or their combination. In In re Gordon, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984) the Court of Appeals for the Federal Circuit ("CAFC") reversed a Board of Appeals decision that a patent application's claims were obvious under 35 U.S.C. § 103 holding "that although a prior art [fuel filter] device could have been turned upside down, that did not make the modification obvious unless the prior art fairly suggested the desirability of turning the device upside down." Continental Can Co. USA, Inc. v. Monsanto Co. 948 F.2d 1264, ___, 20 USPQ2d 1746, 1751 (Fed. Cir. 1991). "The mere fact that the prior art could be . . . modified would not have made the modification obvious unless the prior art suggested the desirability of the modification." In re Gordon, supra at 221, 1127.

Furthermore, modifying a reference to such an extent that it no longer works for its intended purpose is an unobvious modification. The reference as so modified can no longer be applied to render a claimed invention obvious. "Indeed, if the French [fuel filter] apparatus were turned upside down, it would be rendered inoperable for its intended purpose." In re Gordon, supra citing Application of Schulpen 390 F.2d 1009, 1013, 157 USPQ 52, 55 (CCPA 1968). In Application of Schulpen the Court of Custom and Patent Appeals ("CCPA") reversed a Board of Appeals decision that a patent application's claims were obvious under 35 U.S.C. § 103 because an allegedly obvious modification of the reference would render the apparatus inoperable for producing the apparatus' intended product. A rejection of claims under 35 U.S.C. § 103 based upon inserting negative lenses, disclosed in one reference, into a camera accessory housing between a lens and a film plane, disclosed in a basic reference, was improper because it destroyed the basic reference for its intended purpose. Ex parte Westphalen, 159 USPQ 507, 508 (Bd. App. 1967). Similarly, claims to a deeply-drawable composite formed by coating a partially drawn non-woven fleece, allegedly disclosed in one reference, with a deep-drawable plastic film, disclosed in a second reference, were improperly rejected as being obvious because the combination destroyed the invention disclosed in the first reference. Ex parte Hartman, 186 USPQ 366, 367 (Bd. App. 1974).

The Manual of Patent Examining Procedure ("MPEP") § 2143.01, Eighth Edition, August 2001, at p. 2100-124 - 125, in applying the

controlling legal authority cited above expressly instructs examiners that claims are not to be rejected for obviousness under 35 U.S.C. § 103(a) relying upon a combination of references that renders one of the references inoperable for that reference's intended purpose. This text in MPEP expressly states as follows.

THE PROPOSED MODIFICATION CANNOT
RENDER THE PRIOR ART UNSATISFACTORY
FOR ITS INTENDED PURPOSE

If proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification. In re Gordon, 733 F2d 900, 221 USPQ 1125 (Fed. Cir. 1984) (Claimed device was a blood filter assembly for use during medical procedures wherein both the inlet and outlet for the blood were located at the bottom end of the filter assembly, and wherein a gas vent was present at the top of the filter assembly. The prior art reference taught a liquid strainer for removing dirt and water from gasoline and other light oils wherein the inlet and outlet were at the top of the device, and wherein a pet-cock (stopcock) was located at the bottom of the device for periodically removing the collected dirt and water. The reference further taught that the separation is assisted by gravity. The Board concluded the claims were prima facie obvious, reasoning that it would have been obvious to turn the reference device upside down. The court reversed, finding that if the prior art device was turned upside down it would be inoperable for its intended purpose because the gasoline to be filtered would be trapped at the top, the water and heavier oils sought to be separated would flow out of the outlet instead of the purified gasoline, and the screen would become clogged.).

Correspondingly, MPEP § 2143.01 further declares that:

THE PROPOSED MODIFICATION CANNOT
CHANGE THE PRINCIPLE OF OPERATION
OF A REFERENCE

If the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims prima facie obvious. In re Ratti, 270 F.2d 810, 123 USPQ

349 (CCPA 1959) (Claims were directed to an oil seal comprising a bore engaging portion with outwardly biased resilient spring fingers inserted in a resilient sealing member. The primary reference relied upon in a rejection based on a combination of references disclosed an oil seal wherein the bore engaging portion was reinforced by a cylindrical sheet metal casing. Patentee taught the device required rigidity for operation, whereas the claimed invention required resiliency. The court reversed the rejection holding the "suggested combination of references would require a substantial reconstruction and redesign of the elements shown in [the primary reference] as well as a change in the basic principle under which the [primary reference] construction was designed to operate." 270 F.2d at 813, 123 USPQ at 352.).

Finally, it is impermissible to first ascertain factually what the inventor did and then view the prior art in such a manner as to select from the random facts of that art only those which may be modified and then utilized to reconstruct the invention from such prior art. Panduit Corp. v. Dennison Manufacturing Co., 774 F.2d 1082, 1092, 227 USPQ 337, 343 (Fed. Cir. 1985).

A critical step in analyzing the patentability of claims pursuant to section 103(a) is casting the mind back to the time of invention, to consider the thinking of one of ordinary skill in the art, guided only by the prior art references and the then-accepted wisdom in the field. See Dembiczak, 175 F.3d at 999, 50 USPQ2d at 1617. Close adherence to this methodology is especially important in cases where the very ease with which the invention can be understood may prompt one "to fall victim to the insidious effect of a hindsight syndrome wherein that which only the invention taught is used against its teacher." Id. (quoting W.L. Gore & Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 313 (Fed. Cir. 1983)). In Re Werner Kotzab, 217 F.3d _____, 1369, 55 USPQ2d _____, 1316 (Fed. Cir. 2000).

Magnets v. Electrets

The Columbia Encyclopedia, Sixth Edition. Copyright - 2002 Columbia University Press, discloses that magnetism is a:

force of attraction or repulsion between various substances, especially those made of iron and certain other metals; ultimately [magnetism] is due to the motion of electric charges.¹ (Emphasis supplied.)

That same reference discloses that an electret is a:

solid electrically insulating, or dielectric, material that has acquired a long-lasting electrostatic polarization. Electrets are produced by heating certain dielectric materials to a high temperature and then letting them cool while immersed in a strong electric field.

Argument

Rejection Under 35 U.S.C. § 102(b)

In rejecting independent claim 1 as being anticipated under 35 U.S.C. § 102(b) by the Hannon, et al. patent, the Examiner's Action states at the top of page 3;

[t]he patent to Hannon shows a fish hook 41 with a shank 47, a bend 50, and a point 52 in Figures 9-10 having a magnet 46 mounted on the shank of the hook.

Then without any support in the text or drawings of the Hannon, et al. patent, the Examiner's Action declares that:

[t]he magnet acts as an electret to induce a strike response in fish.

Based upon the legal principles set forth above which characterize what a proper rejection of claims for anticipation under 35

¹ Appendix A hereto completely reproduces the disclosure of the Columbia Encyclopedia regarding both magnetism and electromagnetism.

U.S.C. § 102 requires, and based upon the differences between a magnet and an electret established by the quotations from the Columbia Encyclopedia, the Applicant respectfully submits that pending independent claim 1 traverses rejection under 35 U.S.C. § 102(b) based upon the Hannon, et. al. patent.

The texts quoted from the Columbia Encyclopedia above clearly establish that an electret differs from a magnet both in its effect, and in the fundamental physical principles which they respectively exploit. Clearly, the rejection of independent claim 1 based upon the disclosure of the Hannon, et al. patent violates the MPEP instruction that:

[F]or anticipation under 35 U.S.C. § 102, the teach **every aspect** of the claimed invention either explicitly or impliedly. MPEP supra. (Emphasis supplied)

Moreover, nothing appearing in the Hannon, et al. patent justifies the allegation set forth in the Examiner's Action that:

[t]he magnet acts as an electret to induce a strike response in fish.

Since controlling legal principles cited above require that in determining anticipation under 35 U.S.C. § 102, functional language, preambles, and language in "whereby," "thereby," and "adapted to" clauses cannot be disregarded, Pac-Tec, Inc. v. Amerce Corp. supra., the failure of the Hannon, et al. patent to disclose or even suggest that:

[t]he magnet acts as an electret to induce a strike response in fish

precludes rejecting independent claim 1 as being anticipated under 35 U.S.C. § 102(b) by the Hannon, et al. patent.

For the preceding reasons, the Applicant respectfully submits that pending claim 1 traverses rejection under 35 U.S.C. § 102(b) based upon Hannon, et al. patent, and respectfully requests that the rejection be withdrawn.

Rejection Under 35 U.S.C. § 103(a)

All rejections of claims for obviousness under 35 U.S.C. § 103(a) rely upon the Hannon, et al. patent as the Examiner's Action characterizes that reference in rejecting independent claim 1 for anticipation under 35 U.S.C. § 102(b). Since for the reasons set forth above, the disclosure of the Hannon, et al. patent contradicts and refutes the reference's characterization in Examiner's Action, the Applicant respectfully submits that all pending claims traverse their respective rejections for obviousness under 35 U.S.C. § 103(a) based upon any combination of references which includes the Hannon, et al. patent. For the preceding reason, the Applicant respectfully requests that all rejections of claims for obviousness be withdrawn, and that all pending claims pass immediately to issue.

Furthermore, not only do all pending claims traverse rejection for obviousness under 35 U.S.C. § 103(a) based upon any combination of references which include the Hannon, et al. patent, rejections based upon such combinations violate yet other legal principles set forth above which apply to claim rejections for obviousness. For example, substitution of an electret for the magnet disclosed in the Hannon, et al. patent modifies the reference to

such an extent that it no longer works for its intended purpose, i.e. protecting a fish hook from catching in weeds. A modification of a reference so it no longer works for its intended purpose is an unobvious modification, and the reference as so modified can no longer be applied to render a claimed invention obvious.

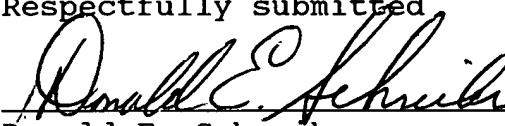
Similarly, MPEP declares that in rejecting claims for obviousness under 35 U.S.C. § 103(a) a proposed modification of a reference cannot change the reference's principle of operation. The Hannon, et al. reference operates using magnetism. Substituting an electret for a magnet changes the references principle of operation in violation of the instruction which appears expressly in MPEP.

Since nothing in the Hannon, et al. patent discloses or even suggests either using an electret or that a magnet induces a strike response in fish, the issue then becomes what is the source of the inspiration to use an electret for inducing a strike response in fish. Clearly the only document even suggesting use of an electret for inducing a strike response in fish is the present patent application. In rejecting claims for obviousness under 35 U.S.C. § 103(a) it is impermissible to first ascertain factually what the inventor did and then view the prior art in such a manner as to select from the random facts of that art only those which may be modified and then utilized to reconstruct the invention from such prior art. Panduit Corp. v. Dennison Manufacturing Co. supra.

Conclusion

The Applicant respectfully submits that, after the amendment of independent claim 1, for the reasons set forth above pending claims 1-47 traverse the rejections set forth in the January 30, 2003, Examiner's Action. Because claims 1-47 now traverse that Examiner's Action's rejections, the Applicant respectfully requests that such rejections be withdrawn, and that this application pass promptly to issue.

Respectfully submitted



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Appendix A

MAGNETISM

force of attraction or repulsion between various substances, especially those made of iron and certain other metals; ultimately it is due to the motion of electric charges.

Magnetic Poles, Forces, and Fields

Any object that exhibits magnetic properties is called a magnet. Every magnet has two points, or poles, where most of its strength is concentrated; these are designated as a north-seeking pole, or north pole, and a south-seeking pole, or south pole, because a suspended magnet tends to orient itself along a north-south line. Since a magnet has two poles, it is sometimes called a magnetic dipole, being analogous to an electric dipole, composed of two opposite charges. The like poles of different magnets repel each other, and the unlike poles attract each other.

One remarkable property of magnets is that whenever a magnet is broken, a north pole will appear at one of the broken faces and a south pole at the other, such that each piece has its own north and south poles. It is impossible to isolate a single magnetic pole, regardless of how many times a magnet is broken or how small the fragments become. (The question as to the possible existence in any state of a single magnetic pole, called a monopole, is still considered open by physicists; experiments to date have failed to detect one.)

From his study of magnetism, C. A. Coulomb in the 18th cent. found that the magnetic forces between two poles followed an inverse-square law of the same form as that describing the forces between electric charges. The law states that the force of attraction or repulsion between two magnetic poles is directly proportional to the product of the strengths of the poles and inversely proportional to the square of the distance between them.

As with electric charges, the effect of this magnetic force acting at a distance is expressed in terms of a field of force. A magnetic pole sets up a field in the space around it that exerts a force on magnetic materials. The field can be visualized in terms of lines of induction (similar to the lines of force of an electric field). These imaginary lines indicate the direction of the field in a given region. By convention they originate at the north pole of a magnet and form loops that end at the south pole either of the same magnet or of some other nearby magnet (see also flux, magnetic). The lines are spaced so that the number per unit area is proportional to the field strength in a given area. Thus, the lines converge near the poles, where the field is strong, and spread out as their distance from the poles increases.

A picture of these lines of induction can be made by sprinkling iron filings on a piece of paper placed over a magnet. The individual pieces of iron become magnetized by entering a magnetic

field, i.e., they act like tiny magnets, lining themselves up along the lines of induction. By using variously shaped magnets and various combinations of more than one magnet, representations of the field in these different situations can be obtained.

Magnetic Materials

The term magnetism is derived from Magnesia, the name of a region in Asia Minor where lodestone, a naturally magnetic iron ore, was found in ancient times. Iron is not the only material that is easily magnetized when placed in a magnetic field; others include nickel and cobalt. Carbon steel was long the material commonly used for permanent magnets, but more recently other materials have been developed that are much more efficient as permanent magnets, including certain ferrocermamics and Alnico, an alloy containing iron, aluminum, nickel, cobalt, and copper.

Materials that respond strongly to a magnetic field are called ferromagnetic [Lat. ferrum = iron]. The ability of a material to be magnetized or to strengthen the magnetic field in its vicinity is expressed by its magnetic permeability. Ferromagnetic materials have permeabilities of as much as 1,000 or more times that of free space (a vacuum). A number of materials are very weakly attracted by a magnetic field, having permeabilities slightly greater than that of free space; these materials are called paramagnetic. A few materials, such as bismuth and antimony, are repelled by a magnetic field, having permeabilities less than that of free space; these materials are called diamagnetic.

The Basis of Magnetism

The electrical basis for the magnetic properties of matter has been verified down to the atomic level. Because the electron has both an electric charge and a spin, it can be called a charge in motion. This charge in motion gives rise to a tiny magnetic field. In the case of many atoms, all the electrons are paired within energy levels, according to the exclusion principle, so that the electrons in each pair have opposite (antiparallel) spins and their magnetic fields cancel. In some atoms, however, there are more electrons with spins in one direction than in the other, resulting in a net magnetic field for the atom as a whole; this situation exists in a paramagnetic substance. If such a material is placed in an external field, e.g., the field created by an electromagnet, the individual atoms will tend to align their fields with the external one. The alignment will not be complete, due to the disruptive effect of thermal vibrations. Because of this, a paramagnetic substance is only weakly attracted by a magnet.

In a ferromagnetic substance, there are also more electrons with spins in one direction than in the other. The individual magnetic fields of the atoms in a given region tend to line up in the same direction, so that they reinforce one another. Such a

region is called a domain. In an unmagnetized sample, the domains are of different sizes and have different orientations. When an external magnetic field is applied, domains whose orientations are in the same general direction as the external field will grow at the expense of domains with other orientations. When the domains in all other directions have vanished, the remaining domains are rotated so that their direction is exactly the same as that of the external field. After this rotation is complete, no further magnetization can take place, no matter how strong the external field; a saturation point is said to have been reached. If the external field is then reduced to zero, it is found that the sample still retains some of its magnetism; this is known as hysteresis.

ELECTROMAGNET

device in which magnetism is produced by an electric current. Any electric current produces a magnetic field, but the field near an ordinary straight conductor is rarely strong enough to be of practical use. A strong field can be produced if an insulated wire is wrapped around a soft iron core and a current passed through the wire. The strength of the magnetic field produced by such an electromagnet depends on the number of coils of wire, the magnitude of the current, and the magnetic permeability of the core material; a strong field can be produced from a small current if a large number of turns of wire are used. Unlike the materials from which permanent magnets are made, the soft iron in the core of an electromagnet retains little of the magnetism induced in it by the current after the current has been turned off. This property makes it more useful than a permanent magnet in many applications. Electromagnets are used to lift large masses of magnetic materials, such as scrap iron. They are essential to the design of the electric generator and electric motor and are also employed in doorbells, circuit breakers, television receivers, loudspeakers, atomic particle accelerators, and electromagnetic brakes and clutches. Electromagnetic propulsion systems can provide motive power for spacecraft. Electromagnets are also essential to magnetic levitation systems. Such systems often use a special kind of electromagnet whose coil is made of a superconducting metal. Because the coils of a superconducting electromagnet offers no resistance to the flow of electricity, no energy is wasted by the development of heat, and the magnetic field produced by the magnet can be very strong. Superconducting magnets are used in magnetic-resonance imaging, and can also be used for energy storage. The first practical electromagnet was invented early in the 19th cent. by William Sturgeon.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Sherif Safwat

Docket no. 2146

Serial no.: 09/674,443

Filed : October 27, 2000

For : BIOELECTRIC SIMULATING
FISHHOOK AND LURE AND METH-
OD OF USING SAME

Art Unit : 3643

Examiner: Kurt C. Rowan

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

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AMENDMENT MADE BY REWRITING
THAT IS MARKED-UP TO SHOW THE CHANGES
RELATIVE TO THE PRIOR VERSION

In the Claims

Claim 1 has been amended as indicated below.

1. (Twice Amended) A bioelectric simulating fishhook comprising:

a shank having an eye formed at an end thereof, the eye adapting the fishhook for coupling to a fishing line;
5 a bend formed at an end of the shank distal from the eye;
a point formed at an end of the bend distal from the shank;
and

10 a self-contained bioelectric simulating means which[.] to induce a strike response in fish, includes an electret and is disposed on the shank.